No. 11928

In the United States Circuit Court of Appeals for the Ninth Circuit

TIGHE E. WOODS, HOUSING EXPEDITER, OFFICE OF THE HOUSING EXPEDITER, APPELLANT

vs.

PEARL ROSE, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

APPELLANT'S BRIEF

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APPELLANT'S BRIEF

STATEMENT OF JURISDICTION

The Housing Expediter appeals from a final judgment of the United States District Court for the Southern District of California, Central Division, entered on February 10, 1948, dismissing an action brought pursuant to Sections 205 (a) and (e) of the Emergency Price Control Act of 1942, as amended (50 U. S. C. App., Sec. 925 (a) and (e)), for violations of the Rent Regulation for Housing (10 F. R. 3436). Notice of appeal was filed on April 1, 1948 (R. 21). Jurisdiction of the District Court was invoked under Sections 205 (a), (c), and (e) of said Act, and jurisdiction of this Court is invoked under Section 128 of the Judicial Code (28 U. S. C. A., Sec. 225).

STATEMENT OF THE CASE

This appeal raises the question of whether the Court below erred in denying a motion for substitution of the party plaintiff in an action brought under Sections 205 (a) and (e) of the Emergency Price Control Act of 1942, and in dismissing the action because a motion for substitution was not made in strict accordance with local rules, and because the original party plaintiff had resigned prior to trial.

This action was instituted on April 18, 1947, by Philip B. Fleming, Administrator, Office of Temporary Controls-Office of Price Administration, in the District Court of the United States for the Southern District of California, Central Division (R. 2–8). It was brought pursuant to Sections 205 (a) and (e) of the Emergency Price Control Act of 1942, as amended, for restitution and statutory damages because of defendant's alleged violations of the Rent Regulation. On May 12, 1947, the defendant answered denying generally charges of violation (R. 8–10).

On January 17, 1947, Frank R. Creedon was the duly appointed, qualified, and acting Housing Expediter, having been confirmed in that position by the Senate on that date (Cong. Rec. Vol. 93, No. 12, p. 455, January 17, 1947). On April 23, 1947, by virtue of Executive Order 9841 (12 F. R. 2645) issued by the President of the United States, Frank R. Creedon was invested with all of the functions with respect to rent control theretofore vested in the Temporary Controls Administrator, Office of Temporary Controls, with full power to continue and maintain in his name all civil

proceedings theretofore instituted, maintained, or defended by the Temporary Controls Administrator.

On June 30, 1947, the Emergency Price Control Act of 1942 expired by its terms. Section 1 (b) of said Act (the savings clause) provided that the provisions of the Act and the applicable regulations shall be treated as still remaining in force for the purpose of sustaining any suit respecting any liability which arose prior to the termination of the Act. On July 1, 1947, the Housing and Rent Act of 1947 went into effect. Under this Act, authority to administer the powers, functions, and duties thereunder was conferred by Congress on the Housing Expediter, to whom rent control was transferred, and who "was retained as the official to administer the [rent control] law" (Sen. Conf. Rep., Cong. Rec., June 19, 1947, p. 7439; Sen. Rep. No. 86, 80th Cong., 1st Sess., p. 2).

On September 9, 1947, after the new Act went into effect and the functions previously exercised by Philip B. Fleming as to cases arising under the Act of 1942 had been transferred to Frank R. Creedon, the new Housing Expediter, a motion was made to substitute Creedon as party plaintiff in the place and stead of Philip B. Fleming in the instant suit. This motion was denied (R. 12). Simultaneously on the motion of the attorney for the defendant, the Court ordered the case dismissed on the ground that there was "no party plaintiff" (R. 12, 18). The reason assigned by the Court below for denying the motion of the plaintiff to substitute Creedon for Fleming was that plaintiff had not complied with the rules of

Court with reference to the notice and the preparation of motion required (R. 19). For reasons which are not apparent in the record, no judgment was entered on this disposition below until February 10, 1948. Prior thereto, however, on November 1, 1947, by virtue of Executive Order (12 F. R. 7265) issued by the President of the United States, Tighe E. Woods was appointed Acting Housing Expediter, and invested with all of the functions with respect to rent control theretofore exercised by Frank R. Creedon, his predecessor, with full power to continue all civil proceedings theretofore maintained by Frank R. Creedon. Accordingly, on December 1, 1947, a motion was made returnable December 15, 1947, to substitute Tighe E. Woods, Acting Housing Expediter, as plaintiff in the place of Philip B. Fleming, the original plaintiff. At the same time, the plaintiff made a motion returnable also on December 15, 1947, for an entry of judgment based upon the Court's previous ruling denying substitution and dismissing the complaint on September 9, 1947. In support of the motion for entry of judgment, the plaintiff called to the District Court's attention, the fact that no judgment had as yet been entered to reflect this previous disposition (R. 16).

Finally, on February 10, 1948, a judgment of dismissal was entered (R. 18, 20). The grounds assigned by the Court below in support of the judgment of dismissal were recited in the judgment as follows:

1. That it appeared to the Court that no notice of motion for substitution of parties plaintiff had ever been served upon the defendant.

2. That Philip B. Fleming had not been Administrator of the Office of Temporary Controls for more than five months prior to the trial.

3. That the plaintiff had not complied with the rules of Court with reference to the notice and the preparation of notice required; and

4. That Philip B. Fleming was no longer the real party in interest; that he was no longer Administrator of the Office of Temporary Controls-Office of Price Administration; and that he no longer had power and authority to maintain said action (R. 19).

No reference was made in the recitals of this judgment to the motion by plaintiff on December 1, 1947, to substitute Tighe E. Woods, Acting Housing Expediter, as plaintiff in place of Philip B. Fleming. From this judgment, Notice of Appeal was filed by the Housing Expediter on April 1, 1948 (R. 21).

SPECIFICATIONS OF ERROR

1. The Court below erred in dismissing the above-entitled action for want of jurisdiction.

2. The Court below erred in dismissing this action on the ground that the plaintiff had not complied with the rules of Court with reference to the notice and preparation of motion for substitution of parties.

3. The Court below erred in dismissing this action on the ground that the original plaintiff had not been in office for more than five months prior to the date of trial.

4. The Court below erred in dismissing this action on the ground that the original plaintiff, Philip B. Fleming, was no longer the real party in interest; that

he was not Administrator of the Office of Temporary Controls; and that he no longer had power and authority to maintain said action.

ARGUMENT

I

Since the United States was always the real party in interest in this suit, it was immaterial who the nominal plaintiff was. Hence, the Court erred in dismissing the action either on the ground that notice of motion to substitute one nominal plaintiff for another was improperly made, or because the original nominal plaintiff was no longer in office, or for any other ground assigned by it in this case

Since the Court below wrote no opinion, the grounds for dismissal of this action must be pieced together from the recitals in its judgment. These were: (1) that no notice of motion for substitution of parties plaintiff had ever been served upon the defendant; (2) that Philip B. Fleming had not been Administrator of the Office of Temporary Controls for more than five months prior to trial; (3) that plaintiff had not complied with the rules of Court with reference to notice and preparation of notice, and (4) that Philip B. Fleming was no longer the real party in interest; that he was no longer Administrator of the Office of Temporary Controls-Office of Price Administration, and that he no longer had power and authority to maintain said action.

None of these grounds for dismissal of the instant action can be sustained because each is based on the theory that the real party in interest was Philip B. Fleming, Administrator, Office of Temporary Controls,

the plaintiff in whose name the action was brought. This was clearly erroneous since the real party in interest was not Philip B. Fleming, or any other individual Administrator, but the United States Government. Examination of the statutory character of the suit and of the cases construing similar actions, shows beyond a question of a doubt that the Administrator's appearance in the action brought under Section 205 (e) was a function of the Office of Temporary Controls and, as such, was effected solely in a representative capacity on behalf of the United States, the real plaintiff. Since the United States was always the real party in interest, it was immaterial who the nominal plaintiff was. For that reason, the action should not have been dismissed either because notice of motion to substitute one nominal plaintiff for another was improperly made, or because the original nominal plaintiff was no longer in office. As we shall show, the ruling below is contrary to this Court's decisions in *United States* v. *Koike,* 164 F. 2d 155, and *Fleming* v. *Findlay and Lenske,* 165 F. 2d 79, as well as a decision of the Eighth Circuit Court of Appeals in *Fleming* v. *Goodwin,* 165 F. 2d 334, certiorari denied, May 24, 1948, and many decisions of other courts.

a. Consideration of the act

Section 205 (e) of the Emergency Price Control Act specifically provides that "* * * The Administrator may institute such action on behalf of the United States * * *." Such a provision is tantamount to an investiture in the United States itself. See, *United*

States v. *Summerlin,* 310 U. S. 414, 416, and cases there cited, where the Supreme Court said:

> The claim assigned to the Federal Housing Administrator acting in behalf of the United States became the claim of the United States and the United States thereupon became entitled to enforce it.

Moreover, the proceeds of any recovery by the Administrator in treble damage cases are, of course, payable solely to the Treasurer of the United States (see, 31 U. S. C. 147; cf. 18 U. S. C. 174, Criminal Code, Sec. 88), and costs cannot "be assessed against the Administrator or the United States" (Sec. 205 (c) of the Act, 50 U. S. C. App. Supp. V, 925 (c)).

While treble damage actions were instituted, as permitted by the statute, in the name of the particular Price Administrator then in office, that procedure patently was adopted merely for judicial and administrative convenience, so that all parties could easily determine the special nature of the action, and could distinguish such actions from the vast bulk of federal litigation normally carried in the name of the United States as such (see, *Fleming* v. *Goodwin,* 165 F. 2d 334, 338 (C. C. A. 8)). However, even though the Administrator exercised the authority to institute action nominally in his name, no distinction can be drawn in respect of such actions between the officer and the office (*Federal Housing Administrator* v. *Burr,* 309 U. S. 242, 249–250). In the *Burr* case, the question was whether the Federal Housing Administration could be sued for garnishment where the statute in question provided that the Administrator, rather than

the agency, could sue or be sued. In holding that the Federal Housing Administration, the office, was subject to garnishment, the Supreme Court stated:

> There is some point made of the fact that suit was brought against the Federal Housing Administration rather than against the Administrator. But when the statute authorizes suits by or against the Administrator "in his official capacity" we conclude that that permits actions by or against the Federal Housing Administration. The Administrator acts for and on behalf of the Federal Housing Administration, since by express terms of the Act all of the powers of the latter "shall be exercised" by him. Hence action by him in the name of the Federal Housing Administration would be action in his official capacity.

The same view has been expressed with respect to actions under the Emergency Price Control Act. Thus, in *Shaw* v. *United States,* 151 F. 2d 967, 970, the Sixth Circuit stated:

> The Price Administrator is not to be distinguished from the Office of Price Administration any more than the Federal Housing Administrator, acting in his official capacity, is to be distinguished from the Federal Housing Administration. *Federal Housing Administration* v. *Burr,* 309 U. S. 242, 249, 250, 60 S. Ct. 488, 84 L. Ed. 724.

It is inconceivable that the institution or maintenance of an action under the Act can be considered a personal or individual function of the Administrator. To accept that view would mean that unless a successor personally directed that his name be sub-

stituted, an action would be allowed to abate. For example, during the year 1946, when there were two changes of Administrators,[1] there were over 28,458 cases (mostly treble damage actions) in the federal courts alone in which the Office of Price Administration was a party plaintiff.[2] Obviously, a personal decision of the Administrator with respect to each case would be impossible. Such litigation was essentially by the office as such, and not actions personal in character in any respect

From the foregoing, it must be obvious that even though instituted in the name of the particular Administrator then in office, treble damage actions were instituted as a function, and a continuing function, of that office as an agency of the United States. That being so, compliance with Rule 25 (d) of the Federal Rules of Civil Procedure or the Abatement Act in 28 U. S. C. Section 780, *infra,* p. 26, providing for the substitution of successor Government officers, was not even required for the continued maintenance of a case such as this. Rule 25 (d), as well as its predecessor, 28 U. S. C. Section 780, was intended only to require substitution of parties where the action was personal in character, brought by or against a public officer, involving his personal performance. At common law, such an action abated, whereas actions for or against the office or governmental body did

[1] Chester Bowles was succeeded by Paul Porter on February 26, 1946, and the latter succeeded by Philip B. Fleming on December 12, 1946.

[2] Annual Report of the Director of the Administrative Office of the United States Courts (1946), p. 56.

not abate (*Thompson* v. *United States,* 103 U. S. 480, 483–485; *United Sates ex rel Bernardin* v. *Butterworth,* 169 U. S. 600; *Weadon* v. *Shahan,* 50 Cal. App. 2d 254, 123 P. 2d 88). The so-called abatement statutes and Rule 25 derived therefrom, were intended to remedy the common law rule in order to allow survival and substitution in the personal suits. They have no application to suits pertaining to the office, such as here, which would not have abated at common law (cf. *Ex parte LaPrade,* 289 U. S. 444, 456–459; see official notes of draftsmen to Rule 25 (d) of Federal Rules of Civil Procedure). These principles are cogently summed up in *Fleming* v. *Goodwin,* 165 F. 2d 334 at p. 337, as follows:

> The purpose of the Rule [25 (d)], like that of the statute which it superseded, was to provide for the continuance of an action, personal in character, brought by or against a public officer, where a substantial need for continuing the action existed and the action could not, without statutory authority, be maintained against his successor after the officer had ceased to hold office. The statute therefore was intended to cover only such actions, to which a public officer was a party, as would abate upon his separation from office. The need for the statute did not arise out of the death or resignation of Government officers who had brought actions on behalf of the Government. Such a statute was needed because the Supreme Court had ruled, in a number of cases, that actions brought against public officers to compel personal performance of their official duties could not be continued

as against their successors, even though the successors consented (citing cases).

b. Consideration of authorities

Decisions by this Court and two other Circuit Courts of Appeals which have had occasion to deal with the problem, are in accord that the United States is the real party in interest in an action brought under Section 205 (e), and that the Administrator in whose name the action was brought is solely a nominal party (*United States* v. *Koike,* 164 F. 2d 155 (C. C. A. 9th); *Fleming* v. *Findlay and Lenske,* 165 F. 2d 79 (C. C. A. 9th); *Fleming* v. *Goodwin,* 165 F. 2d 334 (C. C. A. 8th), certiorari denied, May 24, 1948; *Porter* v. *Maule,* 160 F. 2d 1 (C. C. A. 5th); see, too, *Porter* v. *American Distilling Company,* 71 F. Supp. 483 (S. D. N. Y.); *Fleming* v. *Peoples Natural Gas Company,* 8 F. R. D. 42 (W. D. Pa.)).

In *United States* v. *Koike, supra,* this Court, speaking through Judge Denman, pointed out that although the action for statutory damages is brought in the name of the Administrator, it is actually a suit by the United States, as the real party in interest. Hence, when one Administrator is substituted for another in the suit, it "is not technically a matter of making a new party at all." In substance and reality, the action continued to be a controversy between the Government and the defendant. This Court summed up the rule as follows (164 F. 2d at p. 157):

> In the view we take, the substitution of the United States is not technically a matter of

> making a new party at all. The action here was commenced by Porter under Sec. 205 (e) of the Act, which provides that "The Administrator may institute such action on behalf of the United States." Porter was, therefore, no more than a nominal plaintiff; and Fleming, who should have been substituted as Porter's successor, would have been in no different position. The United States, on behalf of which the action was brought, was the real plaintiff. *Bowles* v. *Goldman,* D. C., 7 F. R. D. 12, 17. Whether the action is maintained by an official authorized to sue on its behalf, or by the United States in its own name, the real plaintiff remains the same.

This Court's decision was followed by the Eighth Circuit Court of Appeals in *Fleming* v. *Goodwin, supra.* In that case, the facts were these: The action was brought on September 6, 1945, by Chester Bowles, Price Administrator, Office of Price Administration, under Section 205 (e) of the Emergency Price Control Act for alleged violations of one of the regulations issued under that Act. Bowles resigned as Price Administrator effective February 25, 1946, and Paul A. Porter became his successor on the following day. On August 23, 1946, Porter filed a motion in the District Court to be substituted for Bowles as plaintiff. This motion was noticed for hearing on August 28, 1946, which was more than six months after Porter had taken office. On November 1, 1946, the District Court entered an order denying Porter's motion and sustaining a motion of the defendants for the abatement and dismissal of the action. Porter ceased to hold the office of Price Administrator on December 12, 1946,

and was succeeded by Philip B. Fleming, Temporary Controls Administrator, under Executive Order 9809 (50 U. S. C. A. App., Sec. 601 note, 11 F. R. 14281). The latter, on January 20, 1947, moved that he be substituted for Porter as plaintiff. The District Court heard Fleming's motion for substitution on January 24, 1947, but reserved its ruling. Fleming, on January 29, 1947, appealed to the Court from the order of November 1, 1946, denying Porter's motion for substitution, and dismissing the action.

On June 18, 1947, the United States Attorney for the Western District of Missouri filed in the Court, a motion to substitute the United States as appellant on the ground that by Executive Order 9842 (50 U. S. C. A. App., Sec. 925 note, 12 F. R. 2646), the Attorney General had been vested with authority to maintain this action in the name of the United States. This motion and objections thereto, together with a motion of appellees to dismiss the appeal, were passed for consideration by the Court at the submission of the appeal on the merits.

The Government contended on appeal that the United States was at all times the real party in interest; that Bowles and those who succeeded to the powers and authority of the office of Price Administrator were nominal parties, and that compliance with Rule 25 (d) of the Federal Rules of Civil Procedure (*infra,* p. 31) was not a condition precedent to the continued maintenance of the action. Sustaining the Government's contention, the Circuit Court, speaking through Judge Sanborn, said the following (165 F. 2d at p. 338):

> We think that Rule 25 (d) is no broader than the reason for it, and that this action may still be maintained, notwithstanding the failure of Bowles' successors to comply with the Rule. The Price Administrator was authorized by Sec. 205 (e) of the Emergency Price Control Act to bring the action "on behalf of the United States." He was not authorized to bring it on his own behalf. The right and duty to institute and maintain the action attached to the office and not to the individual who happened to be holding the office at the time the action was brought. We think that the action survived the resignation of Bowles as Price Administrator and was unaffected by that event. The duty and authority to continue this action on behalf of the Government devolved upon Porter as the successor to Bowles, and then upon Fleming as successor to Porter, and finally upon the Attorney General, who was authorized to maintain it in the name of the United States. The action was, however, in substance and reality, at all times a controversy between the Government and the appellees. The only purpose of substitution in such a case is to keep the record straight so that the judgment finally entered will unquestionably bind the right parties. Such a substitution, we think, amounts to nothing more than a formal amendment to the title of the action to conform it to the truth.

In *Porter* v. *Maule, supra,* the defendants moved to dismiss an appeal of the Administrator, Paul A. Porter, because at the time the notice of appeal was given in the name of Bowles, Porter, not Bowles, was the Administrator, and Porter not having given

notice, there was no proper appeal. The defendants also contended that the orders of the District Judge substituting Porter as plaintiff, and the order of a Judge of the Circuit Court substituting Porter as appellant, were ineffective because granted too late, and because the order of the District Judge was made after the purported appeal and after the District Court had lost jurisdiction. The defendants also claimed that the order of the District Court substituting Porter for Bowles was without force because the law creating the Office of Price Administration had ceased to be effective on June 30, 1946, the office had expired, and it had not been restored or recreated. The Circuit Court of Appeals for the Fifth Circuit rejected these contentions and, speaking through Judge Hutcheson, said the following (160 F. 2d at p. 3):

> As to the substitution of parties, we are in no doubt that in a case of this kind, while suits are brought and proceed in the name of the administrator, he is plaintiff in name only. As administrator, he acts not for himself but for the office. Action that he takes in filing suits, and in appealing from judgments in them, is action on behalf, and for the use, of the office, and when he is no longer administrator, of his successor. * * * We think it plain, though, on reason and on authority, [citing cases] that the suit did not abate but continued both for judgment and for appeal in the name of the nominal plaintiff until his successor was substituted.

More recently, this Court in *Fleming* v. *Findlay and Lenske, supra,* reversed a ruling of the District

Court of the District of Oregon which dismissed an action brought by Fleming, and which refused for jurisdictional reasons to allow substitution of Philip B. Fleming, as plaintiff, in place of Paul A. Porter, Administrator, who had instituted the action. In reaching its conclusion, reliance was placed by this Court upon its previous ruling in *United States* v. *Koike, supra.*

c. Since the United States was the real party in interest, the action could have been continued without substitution of Creedon for Fleming. Therefore, failure to comply with the rules with reference to notice of motion for substitution by the Court below was not a valid basis for dismissal of the suit

From these authorities, it must be manifest that since the United States was the real party in interest at all times, the action could have continued without substitution of Creedon for Fleming. It is, therefore, equally clear that the alleged failure on the part of plaintiff to comply with the rules of the Court with reference to notice of motion for substitution was not an adequate ground upon which to rest the judgment of dismissal in this case. As was said in *Fleming* v. *Goodwin,* 165 F. 2d at p. 338:

> To hold that this action abated upon the resignation of Chester Bowles as Price Administrator and was no longer maintainable because of the noncompliance by his successors with Rule 25 (d), would, in our opinion, be to glorify form over substance and reality. Compare, *Thompson* v. *United States,* 103 U. S. 480, 484, 26 L. Ed. 521; *Porter* v. *Maule,* 5 Cir., 160 F. 2d 1, 3; *United States* v. *Koike,* 9 Cir., 164 F. 2d 155, 157.

Apart from that, it has been held that motions by Government officers for substitution under Rule 25 (d) may be heard ex parte (*Bowles* v. *Weiner,* 6 F. R. D. 540 (E. D. Mich.); *Bowles* v. *Goldman,* 7 F. R. D. 12 (W. D. Pa.); *Porter* v. *Woodruff,* 7 F. R. D. 391 (W. D. N. Y.); *In re Creedon,* 7 F. R. D. 546 (W. D. N. Y.); *Bowles* v. *Blue Ribbon Provisions,* 7 F. R. D. 603 (E. D. N. Y.); *Bowles* v. *Kent County Motor Company,* 6 F. R. D. 515, 516 (D. C. Del.)). These cases reach this result on the basis of the express language of Rule 25 (d) of the Federal Rules of Civil Procedure, which requires notice only "to the party or officer to be affected." In *Bowles* v. *Weiner, supra,* the Court said on this point (6 F. R. D. at p. 542):

> It is therefore the successor-officer who is the party affected and to whom notice is required to be given, and not the opposite party. * * * the defendants are in no manner affected by the substitution of parties plaintiff in this case, and * * * they have not been in any manner prejudiced thereby.

It should also be noted in this connection that in *Fleming* v. *Goodwin, supra,* the District Court held that because of Rule 6 (d) of the Federal Rules of Civil Procedure, "no action could be taken nor showing made until five days after the filing of said motion" (68 F. Supp. 949). In that case, the motion for substitution was filed on August 23, 1946, within six months after Porter took office on February 26, 1946. If strict compliance with Rule 6 (d) was nec-

essary, the motion for substitution was three days late under Rule 25 (d), since Rule 6 (d) provides:

> A written motion, other than one which may be heard *ex parte,* and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, * * *.

As we have shown above, the Circuit Court of Appeals for the Eighth Circuit ruled that "to hold that this action * * * abated * * * because of the non-compliance * * * with Rule 25 (d) would * * * be to glorify form over substance and reality" (165 F. 2d at p. 338).

d. The fact that the original plaintiff had not been in office for more than five months prior to date of trial; that he was no longer the real party in interest, and that he no longer had power and authority to maintain this action, were likewise no proper reasons for dismissing this suit

The other grounds assigned by the Court below for dismissing the suit were that the plaintiff had not been in office for five months prior to trial; that he was no longer the real party in interest, and that he no longer had power to maintain the suit (R. 19).

The short answer to these contentions is that similar contentions were raised in both *Fleming* v. *Findlay and Lenske, supra,* and *United States* v. *Koike, supra,* and in both instances, this Court held them to be untenable. See also, *Fleming* v. *Mohawk Wrecking and Lumber Company,* 331 U. S. 111, 119; *Porter* v. *American National Bank and Trust Company,* 161 F. 2d 504 (C. C. A. 7th).

e. Even if substitution was necessary in this case, since defendant showed no prejudice, it should have been granted in furtherance of justice

In the instant case, the motion for substitution of Frank R. Creedon for Philip B. Fleming was made upon trial. Moreover, prior to entry of judgment of dismissal on February 10, 1948, a motion had been made upon more than ten days' notice to substitute Tighe E. Woods, Acting Housing Expediter, in place of Philip B. Fleming (R. 13–14), but the Court below did not act on this motion. As shown above, we do not think substitution was necessary here since it was unaffected by the resignation of Fleming (*Fleming* v. *Goodwin, supra,* at p. 338). But if it was, then consonant with the liberal principles prevailing under Rule 15 of the Federal Rules of Civil Procedure, following 28 U. S. C. Section 723 (c), substitution should have been granted either upon trial or thereafter, unless prejudice could be shown by defendant. As this Court said in *United States* v. *Koike, supra* (164 F. 2d at p. 157):

> If the substitution of the United States is permitted here, the defendant will in no way be prejudiced. The cause of action against him remains the same, and judgment will bar further suits. *Sunshine Coal Co.* v. *Adkins,* 310 U. S. 381, 402, 60 S. Ct. 907, 84 L. Ed. 123. If substitution is not permitted, however, the result would be to require the United States to proceed in the name of an authorized representative rather than in its own name. The violations set forth in the complaint are alleged to have occurred on or before October 20, 1946, and the time for commencing a new action has

now expired. *Bowles* v. *American Distilling Co.,* D. C., 62 F. Supp. 20, 22.

Under these circumstances, we believe that the motion for substitution should be granted. The federal courts have broad powers to amend pleadings in matters of form at any stage of the case. 28 U. S. C. A., Sec. 777; Rule 15, Federal Rules of Civil Procedure. This power is liberally construed to the end that the courts may be free of technical rules of procedure which delay the determination of causes on their merits. It is within the scope of this power to permit the substitution of a party for whose benefit an action was brought in place of the nominal plaintiff. This has been done both where the nominal plaintiff was found to lack authority to sue, and where the statute of limitations would have barred the commencement of a new action by the real plaintiff. *McDonald* v. *Nebraska,* 8 Cir., 101 F. 171. A fortiori it may be done here, where the nominal plaintiff originally had authority to sue, but was later deprived of it.

And, as was said in *Fleming* v. *Goodwin, supra,* where there was no compliance with Rule 25 (d) (165 F. 2d at pp. 337–338):

> We are convinced that Rule 25 (d) of the Federal Rules of Civil Procedure was not promulgated for the purpose of hampering the Government in its efforts, through its proper officers, to enforce its laws or to obtain judgment for money rightfully due it or for statutory damages. The Rule was never intended to relieve defendants, in actions brought on behalf of the Government, of their statutory liability to the Government.

Since there was no showing of prejudice here, within the principles laid down in *United States* v. *Koike, supra,* and *Fleming* v. *Goodwin, supra,* the Court below erred in denying the motion for substitution.

CONCLUSION

The judgment below should be reversed; the motion for substitution of Tighe E. Woods, Housing Expediter, as party plaintiff, should be granted; and the cause should be remanded for further proceedings.

Respectfully submitted.

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APPENDIX A

Emergency Price Control Act of 1942, as amended (50 U. S. C. App. Secs. 901, et seq).

SECTION 1 (b). The provisions of this Act, and all regulations, orders, price schedules, and requirements thereunder, shall terminate on June 30, 1947, or upon the date of a proclamation by the President, or upon the date specified in a concurrent resolution by the two Houses of the Congress, declaring that the further continuance of the authority granted by this Act is not necessary in the interest of the national defense and security, whichever date is the earlier; except that as to offenses committed, or rights or liabilities incurred, prior to such termination date, the provisions of this Act and such regulations, orders, price schedules, and requirements shall be treated as still remaining in force for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability, or offense.

SEC. 205. (a) Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

SEC. 205. (c) The district courts shall have jurisdiction of criminal proceedings for violations of section 4 of this Act, and, concurrently with State and Territorial courts, of all other proceedings under section 205 of this Act. Such criminal proceedings may be brought in any district in which any part of any act or transaction constituting the violation occurred. Except as provided in section 205 (f) (2), such other proceedings may be brought in any district in which any part of any act or transaction constituting the violation occurred, and may also be brought in the district in which the defendant resides or transacts business, and process in such cases may be served in any district wherein the defendant resides or transacts business or wherever the defendant may be found: *Provided, however,* That all suits under subsection (e) of this section shall be brought in the district or county in which the defendant resides or has a place of business, an office, or an agent. Any such court shall advance on the docket and expedite the disposition of any criminal or other proceedings brought before it under this section. No costs shall be assessed against the Administrator or the United States Government in any proceeding under this Act.

SEC. 205 (e) If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges,

upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50, as the court in its discretion may determine: Provided, however, That such amount shall be the amount of the overcharge or overcharges or $25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; and the word "overcharge" shall mean the amount by which the consideration exceeds the applicable maximum price. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. If such action is instituted by the Administrator, the buyer shall thereafter be barred from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was rendered.

28 U. S. C. Section 780 (Abatement Act) provides in part:

"* * * Where, during the pendency of an action, suit, or other proceeding brought by or against an officer of the United States, or of the District of Columbia, or the Canal Zone, or of a Territory or an Insular Possession of the United States, or of a county, city, or other governmental agency of such Territory or Insular Possession, and relating to the present or future discharge of his official duties, such officer dies, resigns, or otherwise ceases to hold office, it shall be competent for the court wherein the action, suit, or proceeding is pending, whether the court be one of first instance or an appellate tribunal, to permit the cause to be continued and maintained by or against the successor in office of such officer, if within six months after his death or separation from the office it be satisfactorily shown to the court that there is a substantial need for so continuing and maintaining the cause and obtaining an adjudication of the questions involved."

APPENDIX B

3. Pertinent provisions of the Rent Regulation for Housing (10 F. R. 3436).

SEC. 2. *Prohibition against higher-than-maximum rents.*

(a) *General Prohibition.*—Regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, no person shall demand or receive any rent for or in connection with the use or occupancy on and after the effective date of regulation of any housing accommodations within the Defense-Rental Area higher than the maximum rents provided by this regulation; and no person shall offer, solicit, attempt, or agree to do any of the foregoing. Lower rents than those provided by this regulation may be demanded or received.

SEC. 10. *Enforcement.*—Persons violating any provision of this regulation are subject to criminal penalties, civil enforcement actions and suits for treble damages as provided for by the act.

SEC. 13. *Definitions.*—(a) When used in this regulation the term:

(5) "Person" includes an individual, corporation, partnership, association, or any other organized group of persons, or legal successor or representatives of any of the foregoing, and includes the United States or any agency thereof, or any other government, or any of its political subdivisions, or any agency of any of the foregoing.

(8) "Landlord" includes an owner, lessor, sublessor, assignee or other person receiving or entitled to receive rent for the use or occupancy of any housing accommodations, or an agent of any of the foregoing.

(10) "Rent" means the consideration, including any bonus, benefit, or gratuity, demanded or received for or in connection with the use or occupancy of housing accommodations or the transfer of a lease of such accommodations.

APPENDIX C

Federal Rules of Civil Procedure (28 U. S. C.) following Section 723 (c):

Rule 6 (d). *For Motions—Affidavits.*—A written motion, other than one which may be heard *ex parte,* and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on *ex parte* application. When a motion pursuant to this rule may be made when it is served with the motion; and, except as otherwise provided in Rule 59 (c), opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time.

Rule 15 (b). *Amendments to Conform to the Evidence.*—When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining

his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

Rule 25 (d) *Public Officers; Death or Separation from Office.*—When an officer of the United States, the District of Columbia, a state, county, city, or other governmental agency, or any other officer specified in the Act of February 13, 1925, c. 229, § 11 (43 Stat. 941), U. S. C., Title 28, § 780, is a party to an action and during its pendency dies, resigns, or otherwise ceases to hold office, the action may be continued and maintained by or against his successor, if within 6 months after the successor takes office it is satisfactorily shown to the court that there is a substantial need for so continuing and maintaining it. Substitution pursuant to this rule may be made when it is shown by supplemental pleading that the successor of an officer adopts or continues or threatens to adopt or continue the action of his predecessor in enforcing a law averred to be in violation of the Constitution of the United States. Before a substitution is made, the party or officer to be affected, unless expressly assenting thereto, shall be given reasonable notice of the application therefor and accorded an opportunity to object.

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